

has not pleaded a justification he may state certain facts in mitigation of damages in a special notice which must be served seven days at least before the trial: Order 36, r. 37; Vide Starkie on L. & S., 5th ed., 348.

Without discussing at greater length the cases cited or commented on in counsel's briefs I have come to the conclusion that the portion of 4th paragraph of the defence complained of must be struck out as irregular and embarrassing.

As I cannot think the matter complained of very seriously embarrasses the plaintiff in his pleading, although no doubt improper, the order as to costs will be that the costs of this application be plaintiff's costs in the cause.

### NOVA SCOTIA.

PROBATE COURT FOR ANNAPOLIS COUNTY.

SEPTEMBER 11TH, 1909.

IN RE ELLIOTT.

*Construction of Will—Life Estate—Gift Over of Residue "as Left Unused" by Life Tenant.*

Testator's will provided as follows: "I give, devise and bequeath all my real and personal estate whatsoever and wheresoever unto my affectionate wife Bertha A., for her own use during the term of her natural life and from and after her decease I give, devise and bequeath the residue of my said estate as left unused by my said wife unto my children living at my decease and to the issue of any children who may die before me in equal shares so that my said children shall have the same shares as the issue of any deceased child shall have." Testator authorised his wife to sell and convey his real estate, and he appointed his son and a son-in-law executors and trustees of the will. He died leaving no real estate.

F. L. Milner, for the children, contended that the widow took a life interest only, and that the words "left unused by my said wife" meant that if she had not drawn the income up to the time of her death, such income being "left unused" went into the residue; and that if the testator had intended to give the widow the right to any of the corpus he should have used proper words for that purpose. He relied on *Constable v. Bull*, 22 L. J., Ch. 182.